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Supreme Court, U. S.
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In The Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-774
and
No. 72-866

DR. JOHN F. COOPER,

Petitioner

vs.

THE FLORIDA STATE BOARD OF DENTISTRY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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INTRODUCTION

The Respondent, The Florida State Board of Dentistry, in this Brief is making a common response to the Petitions For Writ of Certiorari filed with this Court by the Petitioner, Dr. John F. Cooper, being Case Numbers 72-774 and 72-866.

It is respectfully shown that the Petitions are identical with the exception of a reference to a report of the Board of Trus-

tees of the American Medical Association, which was in no way a part of the proceedings below.

QUESTIONS PRESENTED

Respondent, The Florida State Board of Dentistry, is not satisfied with Petitioner's Federal Questions Presented for review or with the argumentative and factually unsupported manner in which the questions are framed, and would prefer to state the questions presented as follows:

1. Under the laws of the State of Florida, can the public be protected from a dentist because he is a habitual user of intoxicants and drugs rendering him unfit for the practice of dentistry and has been guilty of malpractice, willful negligence in the practice of dentistry, misconduct in his business and personal affairs which would bring discredit upon the dental profession, and for failure to provide sanitary facilities and conditions?

2. Is Florida permitted, through the Legislature and under the police powers, to provide for qualifications and to prohibit certain clearly set forth conduct to protect the health, safety and welfare of the people of the State of Florida?

3. Can a dentist, a habitual user of intoxicants and drugs which impairs his ability to practice dentistry, be subject to having his license revoked to protect the citizens of the State of Florida from such dentist?

4. Is the accused in an administrative hearing afforded due process of law when he is given proper and appropriate notice under the Statutes, has counsel, subpoenas witnesses, makes a judicial attack upon the Board's proceedings prior to the hearing, which the Circuit Court (of Florida) denied,

attends the hearing represented by counsel and presents twenty-seven witnesses in the accused's case, has a full review of all matters prior to the hearing and at the hearing, is given full opportunity to be heard, and, subsequent to the hearing, a complete review by a Florida Appellate Court and a further review by the Supreme Court of Florida?

It is respectfully submitted that these questions can all be answered in the affirmative.

STATEMENT OF THE CASE

Respondent believes that a more orderly and accurate statement of the case can be and should be presented to this Court, rather than disjunctive, confusing and illogically placed statements made to this Court by the Petitioner. We respectively submit what we believe to be a more chronological and factual presentation of the statement and history of the case.

Respondent, The Florida State Board of Dentistry, is a regulatory agency established by the Legislature of the State of Florida (Chapter 466 of the Florida Statutes) for the purpose of inter alia of conducting hearings on proceedings to revoke or suspend a license when evidence has been presented showing violations of the aforesaid statute.

The Petitioner, Dr. John F. Cooper, was a licensed dentist authorized to practice dentistry in the State of Florida prior to the revocation of his license by the Respondent Board.

Respondent conducted a hearing on the Accusation dated December 9, 1971, and without going into the details of the Accusation, which was in minute detail, the Petitioner was accused under Florida Statutes 466.24 of being a habitual

user of intoxicants and drugs rendering him unfit for the practice of dentistry, of being guilty of misconduct in his business or personal affairs which would bring discredit upon the dental profession, malpractice and willful negligence in the practice of dentistry.

The charges stemmed from the excessive and habitual use of intoxicants and drugs by the Petitioner for a period from 1963 to just before the Accusation was filed. The Petitioner drank intoxicating beverages at his dental office for a number of years immediately preceding the Accusation to such an extent that he could not perform dental services in his office or maintain any schedule of dental appointments, and would use intoxicants and drugs to the extent that he would pass out and be without the use of his normal faculties and would lie in an unsanitary and filthy condition during these periods of time.

The Petitioner issued prescriptions using the names of many individuals for whom the prescriptions were never intended and knowing full well that the issuance of the prescriptions for the drugs were to be used, not for the individual in whose name they were issued, but for himself, he would issue the prescriptions and take the drugs.

The Petitioner, while engaged in the practice of dentistry, as alleged in the Accusation, became so intoxicated and disorderly that it resulted in his arrest, and further for aggravated assault or public drunkenness approximately fifteen times from 1963 to 1971.

During this period of time, the privilege of driving an automobile was taken from the Petitioner because of his driving while intoxicated and his entering a plea of guilty to drunken driving.

The Petitioner was unable to perform and manage his business and personal affairs, including, but not limited to, his entire financial affairs of his dental office, his bank accounts, including the fact that it was necessary for his bank accounts to be maintained in the name of his secretary, and that he issued and cashed worthless (bad) checks.

A Notice of Hearing, together with the Accusation, was served upon the Petitioner in accordance with Florida Statutes.

Petitioner made certain motions, together with a Motion For Continuance, which was couched in general terms and was acted upon immediately by the Board. At the same time, a Motion For Bill Of Particulars, a Motion For List Of Witnesses, and a Motion To Dismiss were filed, all of which were promptly acted upon by the Board. In addition thereto, Petitioner's counsel was in constant contact with the Board's attorney and was advised on procedures and the Board cooperated fully with the Petitioner and his counsel on all matters required for said hearing.

The Board received a request from the Petitioner for twenty-eight witness subpoenas, all of which were hastily dispatched and served on the witnesses, with the Petitioner producing twenty-seven witnesses at the hearing, and any witness not so produced, a stipulation was entered into that information submitted by that witness was received into evidence on behalf of the Petitioner.

The Petitioner made no request for or noticed any depositions and received the full cooperation of the Board and its counsel in preparing for the hearing.

Immediately prior to the said hearing, on January 14 and

15, 1972, Petitioner filed an Application for Declaratory Judgment and a Motion For Temporary Injunction in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, urging the same points that he urged before the Florida Appellate Courts. After a full and complete hearing on the Application for Declaratory Judgment and Motion For Temporary Injunction, the Application was denied and the Motion dismissed. The Petitioner did not appeal the ruling of the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, wherein the Circuit Judge ruling on Petitioner's Application and Motion commented succinctly that the Accusation was as detailed, clear, exacting and informative as any administrative charge he had ever seen.

The Petitioner entered a plea of guilty to certain charges and took the witness stand and admitted what he stated were his indiscretions (actually the charges), either in whole or in part.

At no point in the proceedings did the Petitioner ever attempt to produce any physician, either by subpoeaning him, by deposition, or by a written report or otherwise regarding any evidence concerning Petitioner's condition.

After the full and fair hearing, the Board made its determination of fact based upon competent, substantial evidence as found by the reviewing courts.

Petitioner filed a Petition For Writ of Certiorari with the District Court of Appeal of Florida, Third District, and after review and argument before the said court, the said District Court of Appeal of Florida, Third District, denied Petitioner's Petition For Writ of Certiorari and also denied Petitioner's Petition For Rehearing.

Whereupon the Petitioner sought both by way of appeal and by certiorari a review of this case by the Supreme Court of Florida, and after filing briefs and hearing oral argument, the Supreme Court of Florida dismissed the appeal and denied the Petition For Certiorari.

Whereupon the Petitioner filed his Petition For Writ of Certiorari to this Court, both from the Third District Court of Appeal of Florida and from the Supreme Court of Florida. Said Petitions being the same with the exception of a reference to a report of the Board of Trustees of the American Medical Association, which was in no way a part of the proceedings below.

A common response is being made herein to said Petitions.

ARGUMENT

Respondent would respectfully submit to this Court that it is difficult to submit an appropriate and logically oriented brief if the Respondent attempts to answer the Petitioner's Petitions using the outline form and procedure adopted by the Petitioner.

Although the Petitioner purportedly begins his Argument on page 45 of his Petitions, much of the preceding pages submitted by the Petitioner are argumentative and factually unsupported and would indeed be difficult to answer line by line and this Brief not become as confusing, disjunctive and rambling as Petitioner's Petitions.

1. IS A STATE STATUTE, WHICH IS PENAL IN NATURE DEALING WITH THE REVOCATION OF A DENTIST'S LICENSE, REPUGNANT TO THE

DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES IF SAID STATUTE: (1) IS SO VAGUE, INDEFINITE AND STANDARDLESS AS TO FAIL TO GIVE MEN OF COMMON INTELLIGENCE FAIR NOTICE OF WHAT IT FORBIDS? (2) FURTHER, CAUSES MEN TO NECESSARILY GUESS AT ITS MEANING AND DIFFER AS TO ITS APPLICATION?

As Restated by Respondent:

UNDER THE LAWS OF THE STATE OF FLORIDA, CAN THE PUBLIC BE PROTECTED FROM A DENTIST BECAUSE HE IS A HABITUAL USER OF INTOXICANTS AND DRUGS RENDERING HIM UNFIT FOR THE PRACTICE OF DENTISTRY AND HAS BEEN GUILTY OF MALPRACTICE, WILLFUL NEGLIGENCE IN THE PRACTICE OF DENTISTRY, MISCONDUCT IN HIS BUSINESS AND PERSONAL AFFAIRS WHICH WOULD BRING DISCREDIT UPON THE DENTAL PROFESSION, AND FOR FAILURE TO PROVIDE SANITARY FACILITIES AND CONDITIONS?

The Florida State Board of Dentistry is a Board created by the Legislature of the State of Florida with its responsibility under the police powers to protect the health, safety and welfare of the people of the State of Florida as set forth in Section 466.01 of the Florida Statutes.

> "466.01 Objects and purposes of chapter.—The practice of dentistry in the state is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public in-

> terest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified dentists be permitted to practice dentistry in the state. All provisions of this chapter relating to the practice of dentistry and dental hygiene and to the registration of dental laboratories shall be liberally construed to carry out these objects and purposes."

It has long been recognized in the United States and the States of the United States that the Legislature of the various States may prescribe qualifications and requirements for the privilege of practicing a profession in that State. It is likewise the very foundation of the law as applies to Administrative Boards that they may act through appropriate legislation to protect the health, safety and welfare of the people of a State from a professional man that would violate the qualifications and requirements of fitness as set forth by the Legislature.

The case of *Smith v. Texas*, 233 U.S. 630 (1913), which case is cited by the Petitioner, is authority from this Court that if the service is public (which the practice of dentistry is), the State may prescribe qualifications and require examinations to test the fitness of persons to engage in or remain in the public calling. This Court says:

> "If the service is public, the state may prescribe qualifications and require an examination to test the fitness of any person to engage in or remain in the public calling. Re Lockwood, 154 U.S. 116, 38 L.Ed. 929, 14 Sup.Ct.Rep. 1082; Hawker v. New York, 170 U.S. 189, 42 L.Ed. 1002, 18 Sup.Ct.Rep. 573; Watson v. Maryland, 218 U.S. 173, 54 L.Ed. 987, 30 Sup.Ct.Rep. 644."

And this Court further said:

> ". . . This and the other cases establish, beyond controversy, that, in the exercise of the police power, the state may prescribe tests and require a license from those who wish to engage in or *remain* in a private calling affecting the public safety . . . ."
> (Emphasis is Supplied)

Petitioner attempts to make the argument that Chapter 466.24 is vague, indefinite and standardless. It is hard to conceive of such a statement being made, when the Petitioner sets forth in his Petitions on pages 10, 11, 12 and 13 the rather exacting provisions as to when a dentist's license might be subject to suspension or revocation for a violation of said section or parts thereof.

Petitioner in his Petitions attempts at one point to break down into small segments Section 466.24 and then to erroneously and ridiculously guess at what these tiny segments mean, when if each segment is read as a section, it is abundantly clear what is meant by the law. He wishes to enter into the field of surmise and conjecture and to make up facts and circumstances, none of which are a part of this case, rather than to look at the clear and concise language of the Statutes and to the Accusation wherein the Petitioner was charged with particular sections of Chapter 466.24.

Petitioner has used the same argument throughout the courts of the vagueness of the Statutes and the vagueness of the Accusation. The Circuit Court Judge for the Eleventh Judicial Circuit, in and for Dade County, Florida, succinctly summed up the matter when he denied Petitioner's Application for Declaratory Judgment and Motion For Temporary Injunction and stated that the law and the Accusation could not be more detailed or emphatic or any clearer.

Petitioner has used the statement the law is drafted to mean different things to a man of common intelligence, yet many pages of his Petitions and his Argument are not the thoughts of a man of common intelligence, but more the ramblings of someone who is attempting to be obviously ridiculous.

Petitioner is obviously ignoring the clear language of the Accusation and the clear unequivocal language of the Statutes.

Section 466.24(1) of the Florida Statutes states:

> "466.24 Suspension or revocation of license certificate for cause.—The board shall suspend or revoke the license of any dentist or dental hygienist when it is established to its satisfaction that he:
>
> (1) Is a habitual user of intoxicants, or drugs or is afflicted with physical disability, senility, psychiatric disorders or other disease deemed dangerous to the public health, thus rendering him unfit for the practice of dentistry or dental hygiene."

What could be more clear than the need to protect the health, safety and welfare of the people of the State of Florida from a dentist who is a habitual user of intoxicants and drugs, the use of which renders him unfit for the practice of dentistry. The competent, substantial evidence, which was presented to the Board and which has been reviewed by the Florida Courts, clearly showed that the Petitioner was unfit to practice dentistry by the use of intoxicants and drugs and was incapable of maintaining a dental office. Serious and permanent injury could befall a patient of the Petitioner because of Petitioner's inability to perform in his office because of his use of intoxicants and drugs.

Petitioner, in his Petitions, continues to misquote the clear intent of the law when he states that persons with physical disabilities rendering them unfit for the practice of dentistry would not be in violation of the law. The Statute is clear that if a person is rendered unfit for the practice of dentistry because of physical disability, such person is subject to having his license suspended or revoked because of such physical disability.

The Petitioner, in several portions in his Petitions referring to the vagueness of the Statutes, asks the question, what is malpractice. Malpractice is subject to a definition, but what constitutes malpractice would be determined from the acts and conduct of the individual dentist.

The leading annotated case of *Jiro Yoshizawa v. Harry R. Hewitt*, 79 A.L.R. 317, 52 F.2d 411, holds that a Statute providing for revocation of a physician's license for "gross carelessness" is not too vague and that a Statute providing that the license of a physician may be revoked by the officers or board by which such licenses are granted is not rendered uncertain or otherwise invalid because the grounds for revocation are stated in general terms. The Court in the annotated case said:

> "In making 'gross carelessness' one of the grounds for revocation of a license it is clear that the statute did not go beyond the constitutional powers of the Legislature. The phrase is synonymous with 'gross negligence,' and the latter phrase has a well-understood meaning built up in innumerable cases arising in all branches of the law, as well as in many cases involving the relations of physicians and their patients.
>
> 'Gross negligence' is that entire want of care which would raise a presumption of conscious indifference

to consequences; an entire want of care, or such a slight degree of care as to raise the presumption of entire disregard for, and indifference to, the safety and welfare of others; the want of even slight care or diligence. Foster v. State [102 Tex. Cr. R. 602] 279 S. W. 270; L. & N. Ry. Co. v. Smith [135 Ky. 462] 122 S. W. 806; Strong v. Western Union Telegraph Co. [18 Idaho, 389] 109 P. 910 [30 L.R.A. (N.S. 409, Ann. Cas. 1912A, 55]; Words and Phrases, Third Series, 'Gross Negligence.'"

'In the absence of any statute the common law holds every physician and surgeon answerable for an injury to his patient resulting from want of the requisite knowledge and skill, or the omission to use reasonable care and diligence, or the failure to exercise his best judgment.' 21 R. C. L. 26, p. 379.

In view of the established meaning of the term under the common law, as interpreted in a long line of cases, it cannot be successfully maintained that 'gross carelessness' is too vague an expression, or that the charge filed against the defendant-appellant did not give him notice of the nature of the allegation which he was called upon to defend.

The term 'gross carelessness' has an ascertainable meaning to the medical profession as well as to laymen. In the instant case the 'gross carelessness' and 'manifest incapacity' were alleged to have been shown in treating a patient 'for suspected threatened abortion.'

The phrase 'manifest incapacity,' however, stands in a different light from that just treated. The phrase is not defined by the common law; we have been unable to find a judicial interpretation of the phrase as

an entity either in cases in general or in those dealing with physicians particularly; there is nothing in the instant statute that attempts to define the term. The phrase must, then, be interpreted.

In Re Hermance v. Supervisors of Ulster County, 71 N. Y. 481, it was said: Something manifest is 'something which is apparent by an examination . . . needing no evidence to make it more clear. That which is open, palpable, and, I might add, uncontrovertible.' In Travelers' Insurance Co. v. Richmond (Tex. Com. App.) 291 S. W. 1085, 1087, it was said that 'incapacity' used without qualifying words means 'inefficiency,' 'incompetency,' and 'lack of adequate power.' Manifest incapacity, then, in the sense of the statute means a lack of power to comprehend or to act, such lack being so obvious that no proof is necessary to establish it, other than proof of the act itself.

The board of health of Hawaii has seven members, of whom two are physicians. Their decision as to any particular case would be opinion, but opinion in the sense that a jury's verdict is opinion. One can never escape the fact that the judgment of administrative boards must, in the last analysis, be opinion, but in the case of a board in which there are professional men, an opinion fortified with judgment and experience.

In this connection, we may state in passing that section 15 of the Revised Laws of Hawaii 1925 provides: "Each of the terms 'or' and 'and' has the meaning of the other or of both, where the subject matter, sense and connection require such construction."

Accordingly, it might be argued that proof of acts of *either* 'gross carelessness' *or* 'manifest incapacity'

might be sufficient to support a revocation of a physician's license. We are not basing our decision, however, upon this ground.

Nor are we relying upon the form of license set forth in section 1027, which provides: 'This license is granted and accepted on the express condition that it may be revoked at any time for professional misconduct, gross carelessness or manifest incapacity; such misconduct, carelessness or incapacity, having been proven to the satisfaction of the board of health, and by the body reported to the treasurer.'

We desire to point out, however, that this provision in the license was impliedly agreed to by the appellant when he accepted the license. It will also be noticed that the conjunction used in the license is 'or' and not 'and,' as in section 1029.

The criterion to be applied to statutes of the nature of the one in question is thus stated in 5 A.L.R. page 94: 'The rule obtaining in the majority of the jurisdictions which have passed on the question is that a statute providing that the license of a physician, surgeon, or dentist may be revoked by the officers or board by which such licenses are granted, is not rendered uncertain or otherwise invalid because the grounds for revocation are therein stated in general terms.'

In Ruling Case Law, vol. 21, pp. 365-367, we find the following language: 'The universal custom among the states requiring a license of physicians and surgeons is to vest in a medical board the power of examining applicants and determining their fitness to practice. There has been a good deal of litigation involving the validity of such delegation, but almost

always with the result that the delegation was held to be valid. True, such boards are ministerial in their nature, but a full discharge of their duties often necessitates the consideration and determination of questions legal in their nature. However, due process is not necessarily judicial process, and such delegation violates no province of the federal constitution, or of the general laws . . ."

The Court went on to say and quoted from this Court as follows:

"In Bradley v. Richmond, 227 U. S. 477, 482, 33 S. Ct. 319, 57 L. ed. 603, the court said: 'Neither do we see any reason under the 14th Amendment why the state may not delegate to either the council of the city or to a board appointed for that purpose the power to divide such occupations or privileges into classes or subclasses, and prescribes the tax to be paid by the members of each such class. Gundling v. Chicago, 177 U. S. 183, 20 S. Ct. 633, 44 L. ed. 725; Fischer v. St. Louis, 194 U. S. 361, 372, 24 S. Ct. 673, 48 L. ed. 1018, 1024; Lieberman v. Van De Carr, 199 U. S. 552, 560, 26 S. Ct. 144, 50 L. ed. 305, 310. In the case last cited, this court said: 'That this court will not interfere because the states have seen fit to give administrative discretion to local boards to grant or withhold licenses or permits to carry on trades or occupations, or perform acts which are properly the subject of regulation in the exercise of the reserved power of the states to protect the health and safety of its people, there can be no doubt.'

Again, in the case of Douglas v. Noble, 261 U. S. 165, 169, 170, 43 S. Ct. 303, 305, 67 L. ed. 590, we

find the following language, used by Mr. Justice Brandeis: "The Legislature itself may make this finding of the facts of general application, and by embodying it in the statute make it law. When it does so, the function of the examination board is limited to determining whether the applicant complies with the requirements so declared. But the Legislature need not make this general finding. To determine the subjects of which one must have knowledge in order to be fit to practice dentistry, the extent of knowledge in each subject, the degree of skill requisite, and the procedure to be followed in conducting the examination — these are matters appropriately committed to an administrative board. Mutual Film Corporation v. Ohio Industrial Commission, 236 U. S. 230, 245, 246, 35 S. Ct. 387, 59 L. ed. 552, Ann. Cas. 1916C, 296. And a Legislature may, consistently with the federal Constitution, delegate to such board the function of determining these things, as well as the functions of determining whether the applicant complies with the detailed standard of fitness. Reetz v. Michigan, 188 U. S. 505, 23 S. Ct. 390, 47 L. ed. 563."

This Court in the case of *Lee Optical of Oklahoma vs Williamson*, 348 U.S. 483, 99 L.Ed. 563, 75 S.Ct. 461, cited in the case of *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 10 L.Ed.2d 983, 83 S.Ct. 1759, involved an Oklahoma Statute dealing with the regulation of visual care and was upheld against claims of unconstitutionality by the Supreme Court of the United States in toto by all members of the Court, 8 in number, which heard the case. Mr. Justice Douglas, speaking for the Court and delivering the opinion states that the day is gone when this Court uses the due process clause of the 14th Amendment to strike down

state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

In the case of *Mack v. Pepper*, 192 So.2d 66, Cert. denied by Fla.Sup.Ct. 430 F.2d 862, Cert. denied by the U.S.Sup.Ct. 28 L.Ed 2d 237, the Florida District Court of Appeal, Third District, said:

> "Petitioner, Roy F. Mack, seeks review, by writ of certiorari, of an order of the Florida State Board of Dental Examiners which revoked his license to practice dentistry. The Board found the petitioner guilty of three separate charges; they are: (1) he caused to be listed in the yellow pages of the Greater Miami Telephone Directory a listing for Palm Springs General Hospital with his private number; (2) he advertised professional services at a greatly reduced cost to certain members of trade unions; (3) misconduct in his business which would bring discredit upon the dental profession."
>
> "In his brief, petitioner has presented two points. The first point urges that the procedure before the Dental Board was such that he was deprived of a fair and impartial trial. The second point urges that the Board's findings are not supported by substantial competent evidence. We have reviewed the record in the light of these charges, and we find that the first point is without merit. See State ex rel. iWlliams v. Whitman, 116 Fla. 196, 150 So. 136, 156 So. 705, 95 A.L.R. 1416 (1934); Florida Board of Pharmacy v. Levin, Fla. 1966, 192 So.2d 14 (filed October 12, 1966). The second point is also without merit. A review of the record

reveals evidence to support the finding of the Board under the rules laid down in DeGroot v. Sheffield, Fla. 1957, 95 So.2d 912 and Florida State Board of Dental Examiners v. Feinglass, Fla.App. 1964, 166 So.2d 686."

"We find particularly apropos to the review of this record the opinion in Florida Board of Pharmacy v. Levin, supra, wherein the Supreme Court set forth a caution upon the review of orders of State professional boards. The Court stated:

> 'It is true some odium attaches to the method employed by some licensing boards in apprehending violators through the use of agents who make purchases and procure deliveries to themselves of unprescribed or restricted items. Nevertheless, due to the difficulties involved in regulating certain professions, such procedures have been found to be necessary and appropriate to properly administer the regulatory laws in the interest of the health and welfare of the general public. See Mitchell v. Gillespie, Fla.App., 164 So.2d 867, affirmed Fla., 172 So.2d 819; Florida Board of Pharmacy v. Hall, Fla.App., 157 So.2d 824; and Carter v. State, Fla., 155 So.2d 787.
>
> 'It is apparent that because of the particular issues in the hearing, the members of the Board of Pharmacy, who are all pharmacists (see Sec. 465.041, F.S.A.), were in all probability better qualified than others not members of the profession, to determine whether their fellow-professional Levin's action and conduct in the premises measured up to the recognized standards

> and regulations of the pharmaceutical profession.'"

It is respectfully submitted that Chapter 466.24 of the Florida Statutes is indeed clear and subject to definition, and the terms used therein have definite legal meaning and that Petitioner's contention concerning vagueness is without merit and has been held to be without merit by all the courts reviewing this matter.

Petitioner's citation of cases dealing with vagrancy ordinances are without merit and in no way material to the instant case. Neither are Petitioner's citations to cases involving requirements of oaths of loyalty or otherwise in any way involved in this case.

In a Florida case previously cited by the Petitioner it is believed that the language contained therein appropriately sums up the Respondent's position. Petitioner's previous citation of *Varholy v. Sweat*, 15 So. 2d 267, 153 Fla. 571, holds the following proposition:

> "Generally, rules necessary to protect the public health are legislative questions, and appropriate methods intended to accomplish these ends will not be disturbed by the courts."
>
> "All reasonable presumptions should be indulged in favor of the validity of the action of the Legislature and the duly constituted health authorities to protect the public health, but the constitutional guaranties of personal liberty and private property cannot be arbitrarily invaded."
>
> "Enactment and enforcement of necessary and appropriate health laws and regulations is a legitimate exer-

> cise of the 'police power' which is inherent in the state and which it cannot surrender."
>
> "The constitutional guaranties of life, liberty, and property of which one may not be deprived without due process of law do not limit the exercise of the police power of the state to preserve the public health so long as that power is reasonably and fairly exercised and not abused."
>
> "Every reasonable presumption must be indulged in favor of the validity of legislative action in exercise of the police power to preserve the public health, and in favor of the validity of regulations and actions of health authorities."

Although the Petitioner may want to argue that the use of the term "reasonably and fairly exercised" is vague and ambiguous, to restrict the use of these words in the law would be borderline on, if not, ridiculous.

The Petitioner, in his Petition for Certiorari to this Court from the District Court of Appeal of Florida, Third District, on page 51 thereof, makes reference to a report of the Board of Trustees of the American Medical Association. Although this report was not in any way a part of the hearing or review below, it is interesting to note that the article supports the position of the Board and the Courts of the State of Florida when this report says:

> "*Apart* from the cases of alcohol and drug dependence which came before disciplinary bodies with relatively high frequency, there are, as in the general population, other less visible diagnostic entities of mental disorders occurring with, perhaps, greater frequency among physicians . . . ." (Emphasis supplied)

This report recognizes the cases wherein physicians became alcoholics or drug addicts and necessarily came before disciplinary bodies, and then discusses other less visible diagnostic entities of mental disorders. The report goes on to say:

> "The psychotic reactions, without question, impair the ill physician's judgment and ability to practice, and a psychoneurosis or a personality disorder of sufficient degree can constitute a similar risk to the safety of the patient."

Therefore, by the very report which is actually irrelevant and immaterial, it is recognizable that "mental disorders" can constitute *a similar* risk to the safety of the patient. The report recognizes the risk to the safety of a patient from a doctor that is an alcoholic or a drug addict.

The Board, in revoking the license of the Petitioner (which by administrative proceedings under the Florida Dental Practice Act he can petition to have restored), the Respondent is not confining or punishing the doctor, but is protecting the health, safety and welfare of the people of the State of Florida in accordance with the valid and clear Florida law.

2. IS A STATE STATUTE WHICH IS USED IN PERFORMING A VALID GOVERNMENTAL FUNCTION UNCONSTITUTIONAL FOR BEING REPUGNANT TO THE RIGHT OF PRIVACY PROVISION OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IF SAID STATUTE: (1) BY ITS OVERBREADTH ALLOWS AN EXAMINATION OF ALL OF THE BANKING RECORDS AND BUSINESS PRACTICES OF A DENTIST WITHOUT HIS CONSENT? (2) BY ITS

OVERBREADTH ALLOWS AN EXAMINATION ON WHICH TO BASE THE CONCLUSION A DENTIST LACKS THE ABILITY TO MANAGE "HIS PERSONAL AND BUSINESS AFFAIRS"? (3) BY PERMITTING SUCH INVASIONS ALLOWS AN UNREASONABLE SEARCH WITHIN THE MEANING OF SAID AMENDMENT?

As restated by Respondent?

IS FLORIDA PERMITTED, THROUGH THE LEGISLATURE AND UNDER THE POLICE POWERS, TO PROVIDE FOR QUALIFICATIONS AND TO PROHIBIT CERTAIN CLEARLY SET FORTH CONDUCT TO PROTECT THE HEALTH, SAFETY AND WELFARE OF THE PEOPLE OF THE STATE OF FLORIDA?

It is respectfully submitted that part of the argument contained under the first question is also applicable to this question, and there is necessarily some overlapping due to Petitioner's Petitions for which the Respondent apologizes and asks the Court's indulgences in attempting to answer as closely as possible the questions raised and reiterated in various portions of Petitioner's Petitions.

The Respondent, The Florida State Board of Dentistry, has never obtained, searched or in any way used the banking records, check records or business records from the office of the Petitioner. There has never been any search and certainly no illegal search of the Petitioner's records in any way whatsoever. It is also interesting to note that this is the first time this accusation has been made by the Petitioner, and it is factually unsupported and is unfair for the Petitioner to make such statements to the Court as such conduct

never occurred and no information was received or used in any such manner of which the Petitioner well knows.

The record below and the testimony at the hearing was competent and substantial concerning the inability of the Petitioner to practice dentistry and to take care of his office and financial affairs and the testimony of the personnel of his office established this fact without question, and the Petitioner admitted his inabilities, which he termed indiscretions, from the witness stand.

3. IS A STATE STATUTE REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES FOR DENYING A RIGHT UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT IF IT PROVIDES: (1) A DENTIST WHO BECOMES AFFLICTED WITH A MENTAL ILLNESS (AFFLICTED WITH A PSYCHIATRIC DISORDER) AMONG OTHER DENTISTS SIMILARLY SITUATED MAY HAVE HIS DENTAL LICENSE SUSPENDED OR REVOKED WHILE A DENTIST WITH A PHYSICAL DISORDER IS NOT PENALIZED? (2) A DENTIST WHO BECOMES A DRUG ADDICT AMONG OTHER DENTISTS SIMILARLY SITUATED MAY ALSO BE SO PUNISHED.

As restated by Respondent:

CAN A DENTIST, A HABITUAL USER OF INTOXICANTS AND DRUGS WHICH IMPAIRS HIS ABILITY TO PRACTICE DENTISTRY, BE SUBJECT TO HAVING HIS LICENSE REVOKED TO PROTECT THE CITIZENS OF THE STATE OF FLORIDA FROM SUCH DENTIST?

Again, Respondent without being repetitious would invite the Court's attention to the previous statements in its Brief wherein it was clearly shown that a person who becomes physically disabled might have his license suspended or revoked from the practice of dentistry just as someone who, through the use of intoxicants or drugs, becomes unfit to practice dentistry.

It is interesting to note that the Petitioner cites the case of *Smith v. Texas*, supra, which has been previously cited by the Respondent and clearly stands for the proposition that the State may prescribe qualifications and require examinations and tests of fitness for a person to engage in or remain in a public calling, and we add, such as dentistry.

It is interesting to note that the Petitioner cites part of the Florida Medical Practice Act (F.S. Chapter 458, Sec. 1201) as a model and does not consider it to be vague or indefinite when it contains the language "being *unable* to practice medicine with *reasonable* skill and safety to patients by reasons of illness, drunkenness, excessive use of drugs, narcotics, chemicals, or any other type of material or as a result of any mental or physical condition." (Emphasis supplied)

Apparently Petitioner takes exception to what he has termed vagueness in the dental law with respect to the words "reasonable" or "unfit to practice," but has no quarrel with the medical law which uses the terms "reasonable skill" and "reasonable safety" and "unable to practice."

The dental law of Florida allows a dentist to petition to have his license reinstated, and actually affords the dentist the same safeguards, if not stronger safeguards, under the dental law as compared to the medical law, which is of course not before this Court.

Petitioner cites from an opinion of this Court language that a drug addict may be confined for treatment for the protection of society. With this we have no quarrel and show that the Petitioner has not been confined by the Board nor convicted of any crime. The Petitioner has been removed from the practice of dentistry for the purpose of protecting the general safety and welfare of the people of the State of Florida.

In all probability, a person afflicted with a physical disorder rendering him unfit for the practice of dentistry, such as a nervous defect which would cause his hand to jerk and injure tissue of the mouth or subject the patient to injury, would not be allowed to practice dentistry to protect the general welfare and safety of the public. Again, this would not be in the form of punishment but would be in the exercise of the police powers to protect the general public.

Although we have already cited the report of the Board of Trustees of the American Medical Association, which had nothing to do with the hearing or in fact has nothing to do with these Petitions, but as pointed out earlier, it is interesting to note that the report recognizes the risk to the safety of the patients in connection with mental disorders and further that the medical boards have before them numbers of cases involving alcoholics and drug addicts which come before the medical boards as disciplinary bodies.

4. IS A DENIAL OF THE RIGHT TO THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES FOR AN ADMINISTRATIVE BOARD HEARING AN ACCUSATION OF MISCONDUCT CHARGED AGAINST A

DENTIST TO: (1) REQUIRE THE ACCUSED DENTIST TO DEFEND HIS PROFESSIONAL LICENSE WITHIN SEVENTEEN DAYS AFTER SAID DENTIST WAS ABLE TO RETAIN COUNSEL, WHERE THE ATTEMPT TO RETAIN COUNSEL WAS LIMITED DUE TO FINANCIAL REASONS? (2) REQUIRE THE ACCUSED TO DEFEND WITHIN SEVENTEEN DAYS AFTER RETAINING COUNSEL WHEN THE ATTORNEY RETAINED ASKED FOR A BILL OF PARTICULARS AND A CONTINUANCE, UNDER THE CIRCUMSTANCES, AND BOTH REQUESTS WERE DENIED? (3) ALLOW AN ATTORNEY ONLY SEVENTEEN DAYS TO PREPARE A MEANINGFUL DEFENSE IN SUCH A CASE WHERE HE NEEDS TO FIND APPLICABLE LAW, LOCATE AND INTERVIEW AVAILABLE WITNESSES DURING WHAT WAS MOSTLY A HOLIDAY SEASON, TAKE REQUIRED DEPOSITIONS, CAUSE THE NECESSARY SUBPOENAS TO BE ISSUED IN JACKSONVILLE, FLORIDA, AND RETURNED TO MIAMI, FLORIDA, WHERE SERVICE ON SAID WITNESSES WAS REQUIRED IN MIAMI, DADE COUNTY, FLORIDA, AND SANFORD, SEMINOLE COUNTY, FLORIDA? (4) PROVIDE THE ACCUSED DENTIST WITH AN ACCUSATION THAT RECITED CERTAIN CHARGES OF ALLEGED MISCONDUCT BUT SPECIFICALLY STATE AT SEVERAL PLACES IN THE ACCUSATION ". . . BUT NOT LIMITED THERETO"? (5) PROVIDE THE ACCUSED DENTIST WITH AN ACCUSATION DRAFTED ONLY IN THE PAST TENSE BASED UPON A STATUTORY PROVISION PROSCRIBING CONDUCT OF WHICH THE ACCUSED "IS" GUILTY? (6) PROVIDED

THE ACCUSED DENTIST WITH A DETERMINATION OF FACT CONTAINING A CONCLUSION OF GUILT BASED UPON CERTAIN ALLEGATIONS STATED BUT FOLLOWED BY ". . . BUT NOT LIMITED THERETO"? (7) ALLOW THE ATTORNEY WHO ACTED AS THE PROSECUTOR OF THE ACCUSED DENTIST IN THE HEARING OF THE MATTER ON BEHALF OF THE BOARD ALSO TO ADVISE THE BOARD, ALL OF WHOM WERE LAYMEN, ON QUESTIONS OF LAW THAT AROSE DURING THE HEARING? (8) REVOKE THE LICENSE OF A DENTIST PERMANENTLY FOR CONDUCT DONE BEFORE THE DENTIST HAD BEEN HOSPITALIZED AND HAD RECEIVED THREE MONTHS OF PSYCHIATRIC REHABILITATIVE TREATMENT, AND HAD BEEN RETURNED TO THE PRACTICE OF DENTISTRY BY THE ATTENDING PSYCHIATRIST?

As restated by Respondent:

IS THE ACCUSED IN AN ADMINISTRATIVE HEARING AFFORDED DUE PROCESS OF LAW WHEN HE IS GIVEN PROPER AND APPROPRIATE NOTICE UNDER THE STATUTES, HAS COUNSEL, SUBPOENAS WITNESSES, MAKES A JUDICIAL ATTACK UPON THE BOARD'S PROCEEDINGS PRIOR TO THE HEARING, WHICH THE CIRCUIT COURT (OF FLORIDA) DENIED, ATTENDS THE HEARING REPRESENTED BY COUNSEL AND PRESENTS TWENTY-SEVEN WITNESSES IN THE ACCUSED'S CASE, HAS A FULL REVIEW OF ALL MATTERS PRIOR TO THE HEARING AND AT THE HEARING, IS GIVEN FULL OPPOR-

TUNITY TO BE HEARD, AND, SUBSEQUENT TO THE HEARING, A COMPLETE REVIEW BY A FLORIDA APPELLATE COURT AND A FURTHER REVIEW BY THE SUPREME COURT OF FLORIDA?

The Respondent in its statement of facts attempts to set forth in chronological order the Accusation, Notice, Motions, the collateral judicial attack on the law and an attempt to forestall a hearing, the actual charges or accusation brought against the accused dentist, and his full opportunity to be heard.

In addition, the Board has attempted to show the complete review of the cases in the Florida Courts. It was certainly the opinion of the Courts below that the Petitioner had clear and concise charges spelled out in detail with ample opportunity to be heard and with competent, substantial evidence to sustain the charges.

The question concerning "but not limited thereto" can quickly be answered by the following citation of law and excerpt from Respondent's Brief below:

> "The reason for inserting Section 466.24 (3) (n) or the statement in addition to the other Statutes 'but not limited thereto' was in strict keeping with the Supreme Court of Florida's statement in the case of *Florida Board of Pharmacy v. Levin*, 190 So.2d 768, wherein an incorrect section of law was cited as having been violated, that the added language 'was harmless surplusage' and nothing more, and the Supreme Court went on to say:
>
> > 'Licensed pharmacists undoubtedly are familiar with the laws regulating their profession and

must be presumed to have knowledge of F.S. Section 404.02(1), F.S.A., of the Florida Barbiturate Law, which makes it unlawful to deliver to another any barbiturate or central nervous stimulant except upon prescription, with certain exceptions not material to this case. It is quite apparent F.S. Section 404.02(1), F.S.A., was the statute intended to be coupled with the allegations of the complaint, since it logically complements the preceding language of the charge. Technical niceties based upon obvious mistakes and misreferences, which do not mislead or result in manifest unfairness are not grounds under our authorities for overturning administrative determinations. The fact that the Board in its order found Levin guilty of having violated "the provisions of Chapter 404, F.S., relating to the dispensing of certain drugs containing amphetamine salts without first being furnished a prescription," does not nullify the administrative determination since this language sufficiently indicates to all concerned the nature of the violation actually committed even though a nonexistent section of statute was erroneously alluded to in the charge.'

In an abundance of caution, the above language was used by the Board."

The statements of the Petitioner concerning the term "is" in relationship to a violation of the law and the fact that the Accusation was drafted in the past tense is borderline on being ridiculous, as a violation of the law must have been committed in the past for it to be a violation. Certainly the Board has no authority to accuse anyone of violating

the law in the future and would not do so. The Supreme Court of Florida when confronted with a similar argument on the constitutionality of Florida Statutes 466.29, which reads in part "When it appears to the board that any person *is* practicing dentistry . . . .," said in the case of *Beckerman v. Finley,* Fla. 183 So.2d 535:

> "In order to invoke the injunction power of the court the Board must establish a prima facie case by sufficient pleading and proof showing that the person complained against *has been practicing* dentistry . . . ." (Underscoring supplied)

It is abundantly clear that the Supreme Court of Florida had no difficulty in quickly disposing of this contention.

Petitioner's last argument under his purported Fourth Federal Question is factually incorrect. The attorney for the Respondent presented the evidence against the Petitioner at the hearing and in no way took part in the hearing otherwise, as is stated by the Petitioner himself on page 19. The Board made its ruling on legal questions as they arose throughout the hearing and made its finding of guilty. There is nothing inconsistent or in anyway improper in the Board's and its attorney's conduct.

The Respondent has attempted to answer the Petitioner's Petitions in every respect even though Respondent feels that most, if not all, of the matters contained in the Petitioner's Petitions are factually unfounded and immaterial to the question of jurisdiction in this case.

CONCLUSION

It is respectfully submitted that the Petitioner has set forth no valid consideration governing review on certiorari and that this Court should deny the Petitions for Certiorari.

Respectfully submitted,

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Attorney for Respondent

CERTIFICATE OF SERVICE

I DO CERTIFY that copy hereof has been furnished by mail this ..... day of January, 1973, to Glyn Dial Ellis, Esquire, Attorney for Petitioner, Suite 518, 1451 North Bayshore Drive, Miami, Florida 33132.

Attorney